they pass constitutional muster and the type and scope of minority preferences necessary to satisfy the Budget Act's mandate. Second, CIRI's Comments address strict eligibility, anti-trafficking, anti-sham and other provisions which the Commission should adopt to ensure that only entities eligible for preferences -- and which also are serious and qualified bidders -- receive the preferential treatment mandated by Congress. As a bona fide minority-controlled entity, CIRI is particularly sensitive to the need for such safeguards.

II. TO FULFILL ITS CONGRESSIONAL MANDATE THE COMMISSION MUST ADOPT MINORITY PREFERENCE PROVISIONS

Congress has directed the Commission to ensure that minorities (and other designated entities) not only have an opportunity to participate in the provision of spectrum-based services whose licenses will be awarded through competitive bidding, but also that they receive enhanced opportunities to do so. This is evident in Section 309(j)(3)(B)'s mandate that "the Commission . . . shall seek to promote . . . the following objectives [including] disseminating licenses among a wide variety of applicants including . . . businesses owned by members of minority groups and women." Similarly, Section 309(j)(4)(C) requires the Commission, in prescribing its regulations, to "prescribe area designations and bandwidth assignments that

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participate in spectrum-based services.

promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women." Most significantly, Congress directed the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." Section 309(j)(4)(D) (emphasis added).

The Commission has responded to this congressional mandate with proposals for PCS set-asides,[6] bidding preferences,[7] installment payments,[8] and tax certificates.[9] CIRI supports adoption of all of these preferences as long as the Commission vigilantly enforces a strict definition of eligibility. Before commenting on the proposed preferences (and others) and the appropriate criteria for minority eligibility, CIRI will address the threshold question posited by the Commission in the NPRM: whether preferences for minority groups enabling them to participate in spectrum-based services can pass

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[6] NPRM at ¶¶ 73, 76, 121.

[7] Id. at ¶¶ 73, 76, 80 n.61.

[8] Id. at ¶¶ 69, 73, 76, 79-80, 80 n.57.

[9] Id. at ¶¶ 73, 79, 79 n.58, 80 n.64, 121-22.

constitutional muster. As demonstrated below, if the Commission adopts appropriate provisions to police such congressionally-mandated preferences they will pass constitutional muster.

The single most significant fact buttressing the constitutionality of the proposed minority preferences is that they are congressionally mandated. As the Commission recognized: "[A]ny benign race or gender-conscious measures mandated by Congress -- even those not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."[10] Accordingly, the Commission stated that "race or gender-conscious measures adopted in this proceeding would have to be supported by a record which demonstrates that such preferences are substantially related to the objectives of the Budget Act."[11]

The proposed minority preferences are constitutional, not only because they are substantially related to the

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[10] NPRM at ¶ 73 citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 560-563 (1990) ("Metro"), Richmond v. J.A. Croson Co.; 488 U.S. 469 (1989) ("Croson"), Fullilove v. Klutznick, 448 U.S. 448 (1980) ("Fullilove") and

objectives of the Budget Act, but also because they serve a legitimate remedial purpose.

A. The Proposed Minority Preference Provisions Will Pass Constitutional Muster

1. Standard of Scrutiny to be Applied

The standard articulated by the Commission for reviewing benign race or gender-conscious measures mandated by Congress is known as "intermediate scrutiny."[12/] NPRM at ¶ 73. Under the Metro Broadcasting decision, a Court applying intermediate scrutiny to preferential measures examines whether they "[1] serve important governmental interests within the power of Congress and [2] are substantially related to achievement of those objectives." Metro Broadcasting, 497 U.S. at 564. If the preferential measures are found to satisfy both prongs of the test, then the measures will be held to be constitutionally permissible.

CIRI agrees with the Commission's conclusion that intermediate scrutiny will be employed by a court reviewing the constitutionality of any minority preference program implemented by the Commission under Section 309(j)(4)(D).

12/ See Metro Broadcasting, 497 U.S. at 606 (O'Connor, J., dissenting). In lieu of intermediate scrutiny, the Supreme Court has applied what is called strict scrutiny to minority preference programs not mandated by Congress. See City of Richmond v. J.A. Croson Company, 488 U.S. 469, 505-507 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). Strict scrutiny examines whether preferential measures serve compelling governmental objectives and are necessary to the achievement of those objectives.

First, the Metro Broadcasting decision, which enunciated the intermediate scrutiny standard for benign racial preferences, is the most recent pronouncement by the Supreme Court on the issue of congressionally-mandated minority preferences. Second, intermediate scrutiny is consistent with the deference to congressional enactments which the Supreme Court has shown in previous minority preference decisions. For example, in Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court showed a great deal of deference to the congressional determination that remedial measures for minorities were necessary, declaring, "[I]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Id. at 483. In that case, the Court upheld the congressionally-mandated minority preference provision of the Public Works Employment Act of 1977.

In his opinion in Fullilove, Chief Justice Burger indicated that the minority business enterprise program upheld in that case could have been ordered by Congress pursuant to the Spending Power of Article I, § 8, cl. 1 of the Constitution, or pursuant to the Commerce Power of

Article I, § 8, cl. 3. Fullilove, 448 U.S. at 473-75. The parity among these various grants of authority was clear:

> If, pursuant to its regulatory powers, Congress could have achieved the objectives of the [minority business enterprise] program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the [program] through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees.

Id. at 475 (emphasis added).

In City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), on the other hand, the Court struck down a minority-preference provision that, while patterned on the program upheld in Fullilove, was legislated by a municipal government, not by Congress. In a separate opinion, Justice O'Connor observed: "That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate." Id. at 490. In Croson, as in Fullilove, the deference shown to the considered judgment of Congress was clear.

For these reasons, CIRI agrees that the intermediate scrutiny standard articulated by the Court in Metro Broadcasting is the standard that will be applied to any congressionally-mandated preference programs adopted by the

Commission in this proceeding. As the Commission recognized, an examination of the proposed minority preference provisions under the two prongs of intermediate scrutiny requires analysis of (1) whether the preferences serve an important governmental purpose, and (2) whether the preferences are substantially related to the achievement of that purpose. As shown below, the proposed preferences meet both tests.

2. The Record Supports a Showing that Minority Preferences Serve an Important Governmental Purpose

The provisions in Title VI of the Budget Act, when read together, indicate that Congress, in mandating preferential measures, intended to enhance the economic opportunities for members of minority groups and women to participate in the telecommunications businesses for which licenses would be issued by auction. NPRM at ¶ 73 n.48. Thus, the principle governmental purpose of Congress in directing the Commission to consider preferential measures in section 309(j)(4)(D) was to enhance the economic opportunity for those underrepresented groups through the provision of spectrum-based services.

Although there are no specific findings in the legislative history of the Budget Act with respect to the lack of economic opportunity for minority-owned businesses, Congress has previously examined that lack of opportunity and the resulting underrepresentation of such groups, both

in and out of the communications context. For example, in a House conference report accompanying the Communications Amendments Act of 1982, the Conference Committee noted that diversifying the media of mass communications was important because it promoted "ownership by racial and ethnic minorities — groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities . . . ." H.R. Conf. Rep. No.765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S.C.C.A.N. 2261, 2287. The Committee continued:

> The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has severely affected their participation in other sectors of the economy as well. We note that . . . of 8,748 commercial broadcast stations in existence in December 1981, only 164, or less than two percent, were minority owned. Similarly, only 32 of the 1,386 noncommercial stations, slightly over two percent, were minority owned.

Id. at 43-44, U.S.C.C.A.N. at 2287-88.

Similarly, in debate on a Department of Defense minority-owned business preference program, Members of Congress cited the disparity between the percentage of defense contracts going to minority businesses in 1985 (2.2 percent) and the percentage of military personnel from minority groups at the same time (26.7 percent) as evidence that a preference was needed. 131 Cong. Rec. H. 4981, 4982-83 (daily ed. June 26, 1985) (statements of Reps. Savage and

Conyers). In debate on a Department of Transportation minority-owned business preference program enacted in 1982, the sponsoring legislator argued for the acceptance of his program on the basis that minorities at that time were experiencing unemployment greater than the national average (20 percent black unemployment versus the national figure of 10.8 percent). 128 Cong. Rec. H 8954 (daily ed. Dec. 6, 1982) (statement of Rep. Mitchell). In each of these cases, Congress has examined the lack of economic opportunities for minority-owned enterprises and, in the course thereof, has developed an institutional expertise on the issue of the underrepresentation of such entities in key industry segments, including telecommunications.

In his concurring opinion in Fullilove, Justice Powell elaborated on the unique role of Congress in the governance of the nation, and the effect of that role on the type of record upon which Congress may rely when legislating in the area of minority preferences:

> [The] special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 502-03 (Powell, J., concurring) (emphasis added).

In the 1990 Metro Broadcasting decision, the Court quoted this passage as a preface to an extended discussion of the experience of Congress with minority preferences in the communications field. Metro Broadcasting, 497 U.S. at 572. See also id. at 572-579 (detailing the many times Congress has considered telecommunications minority preferences). In Metro Broadcasting, as in Fullilove, the Court determined that a full appreciation of the legislative process counseled against a court limiting its analysis to the legislative history of the particular Act under review.

The congressional goal of creating economic opportunities for minority entities has been found before to be an important governmental purpose. In Fullilove, for example, the Court considered the merits of a minority preference provision of the Public Works Employment Act of 1977. The provision required that, absent administrative waiver, at least 10 percent of federal funds granted for local public works projects was to be used by the state or local grantee to procure services or supplies from businesses owned by minority group members. Underlying that provision was a congressional determination that the minority business community was "'sorely in need of economic stimulus but which, on the basis of past experience with government procurement programs, could not be expected to

benefit from the public works programs as then formulated.'" Fullilove, 448 U.S. at 459 (quoting 123 Cong. Rec. 5097, 5097-98 (1977) (remarks of Rep. Mitchell)). Moreover, another legislator indicated that the preference was intended to "'promote a sense of economic equality in this Nation.'" Id. (quoting 123 Cong. Rec. at 5331 (remarks of Rep. Biaggi)). Against this background, the Court found that the establishment of a preference was within the power of Congress. Id. at 475-77.

Similarly, the Department of Transportation minority preference program discussed above, which mandates that not less than 10 percent of the funds authorized to be appropriated for state highway projects is to be expended with businesses owned and controlled by socially and economically disadvantaged individuals, was upheld in the face of a challenge to its constitutionality in 1992. In that case, a U.S. District Judge applied the Metro Broadcasting intermediate scrutiny standard and ruled that the provisions of the program were substantially related to what the judge concluded was an important congressional purpose. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 245 (D. Colo. 1992).

Therefore, for the purposes of constitutional scrutiny, past congressional findings and debate can and do buttress the record upon which Congress acted in legislating remedies for the chronic underrepresentation of minorities in

numerous areas of our economy in general and in the field of telecommunications in particular. Congress has considered the lack of opportunities for minority group members in the communications field (and other areas) before, and it is entitled to rely on those deliberations here. Those deliberations reveal the considered judgment of Congress that it is appropriate to create economic opportunities for minority-owned businesses through the use of preferences in the distribution of telecommunications licenses. That is the important governmental purpose behind the mandated preferences in the Budget Act and it is supported by sufficient congressional findings both in the legislative history of that Act and in prior legislation dealing with similar issues.[13/]

3. The Section 309(j)(4)(D) Preferences are Substantially Related to that Important Governmental Purpose

The second prong of the Metro Broadcasting intermediate scrutiny standard examines whether the remedial scheme (in this case, the minority preferences) is substantially related to the important governmental objective. That test is met here. In light of the scarcity of frequencies

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[13/] The congressional findings with respect to minority underrepresentation, barriers to entry and lack of economic opportunity are consistent with similar conclusions reached by numerous other groups who have examined the issue. We provide, in Appendix A, a list of reports and studies which reflect the same conclusions on this point as that reached by Congress.

available for telecommunications services, assisting a minority-owned enterprise in being awarded licenses by affording them enhanced opportunities to win auctions for those licenses almost certainly operates to create economic opportunities for that business. Through the use of that license, a minority business enterprise will be positioned to generate revenues that otherwise might not be available to it for a variety of reasons. Thus, the preferential measures mandated by Congress are substantially related to Congress' purpose in enacting those measures -- to create economic opportunities for minority owned-businesses.

As discussed above, Congress has developed an institutional expertise on the need for minority preferences. That expertise, premised on past findings of minority disadvantage, is entitled to great weight from reviewing courts. In mandating specific preferences for members of minority groups in the past, and in the instant case, Congress has made clear its view that the goal of creating economic opportunities for minorities is advanced by such preferential measures. The Supreme Court upheld similar measures based on such reasoning in Fullilove.

Notwithstanding the fact that the preferential measures at issue in this proceeding are substantially related to a legitimate governmental objective, the substantial relationship test also requires a reviewing court to examine whether the remedial scheme is narrowly tailored to achieve

the objectives of Congress. For example, central to the conclusion of Chief Justice Burger's plurality opinion that the Public Works Employment Act program in Fullilove was narrowly tailored was the fact that the program contained specific, congressionally-mandated provisions for exemption and waiver. Those provisions ensured that only legitimate minority-owned businesses participated in the program (exemption) and that the 10 percent subcontracting requirement would not be enforced when no qualified minority-owned businesses were available (waiver). Without those provisions, it is likely that the Supreme Court would have found the 1977 plan to be overinclusive and, thus, not narrowly tailored. See Fullilove, 448 U.S. at 486-87.

Similarly, the U.S. District Court for the District of Colorado upheld the Department of Transportation minority-preference program in 1992 largely because Congress mandated a state-run certification program that annually identifies disadvantaged business enterprises eligible for the program in order to prevent misrepresentation. Adarand Constructors, Inc. v. Skinner, 790 F.Supp. 240, 244-45 (D. Colo. 1992). On the other hand, that same program has no congressionally-mandated waiver provision. Instead, a waiver from the 10 percent disadvantaged business subcontracting requirement can be had only upon application to the Secretary of Transportation under agency-promulgated regulations. See 49 C.F.R. § 23.64(e). Nevertheless, the

court still found the program to be narrowly tailored. Adarand Constructors, 790 F.Supp. at 244.

Since Congress did not set forth "tailoring" mechanisms in section 309(j)(4)(D), but rather left those to be developed by the Commission in the context of this rule-making proceeding, the Commission should now promulgate rules which ensure that the minority preferences utilized in spectrum auctions are not overinclusive and are narrowly tailored to fulfill the governmental objective of assisting previously underrepresented and disadvantaged entities. The Commission has requested comment on various proposals for assessing the eligibility of entities claiming to be minority owned and operated. To the extent that the rules ultimately adopted by the Commission ensure that only legitimate minority enterprises can participate in the spectrum auction preference programs, the exemption requirement detailed above will be satisfied. To satisfy the requirement of a waiver provision, the Commission should consider establishing procedures by which set-aside spectrum blocks are released to general bidding if no qualified minorities apply to bid on the block. This would operate in much the same fashion as the waiver provisions in the Department of Transportation program and in the program detailed in Fullilove.

For all of these reasons, if the Commission establishes appropriate waiver and exemption provisions and otherwise

follows Congress' direction and awards preferences to minority enterprises, concerns about the constitutionality of such preferences should be satisfied. In any event, since there is a sound basis for concluding that the congressionally-mandated preferences will pass constitutional muster, the Commission should defer to that congressional directive and leave to the courts the question whether Congress had the power to authorize such measures.

B. The Commission Must Adopt Strict Eligibility Requirements and Anti-Sham Provisions

To ensure that the benefits Congress intended to bestow on certain designated entities flow only to such entities, strict eligibility criteria and anti-sham provisions must be adopted. As far as determining who is a "minority" for purposes of applying "minority" preferences, CIRI supports the Commission's proposal to use its established definition to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction."[14/]

The more significant inquiry posed by the Commission is whether, in order to qualify for a preference, "women and minority backed applications should be 50.1% owned by these groups or whether simple control is enough to qualify regardless of the percentage of equity held." NPRM at ¶ 77.

[14/] NPRM at ¶ 77 citing Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978).

The Commission also asks how to ensure that the preferences awarded to minority entities do not in fact benefit non-minorities "who might merely use a member of one of those groups for the purpose of achieving special treatment by the Commission." NPRM at ¶ 78.

The key to fulfilling the purpose behind the award of preferences and to deterring sham applicants is requiring that minorities have actual control of the entity which is to receive a preference and that minorities hold a significant equity interest in that entity. The Commission has applied this approach in determining whether a limited partnership is eligible to acquire a broadcast station pursuant to a distress sale. In such cases, the limited partnership must have a minority general partner, with substantial restrictions on control by any other general partners. The minority general partner(s) must also own at least 20 percent of the equity of the partnership. Minority Ownership in Broadcasting, 92 FCC 2d 849, 855 (1982). The same standard is applied to determine whether a limited partnership has sufficient minority involvement to entitle a third party to receive a tax certificate for the sale of a broadcast property to the partnership. Id.

Prior to adopting its 1982 Minority Ownership Policy, the Commission had expressed "serious concern" about requests for tax certificates "for sales to limited partnerships in which minorities exercise control but have

no substantial ownership interest." William M. Barnard, 44 R.R. 2d 525, 527 (1978). The Commission therefore found in the Minority Ownership Policy that the coupling of control plus substantial (20%) equity ownership results in the type of "significant minority involvement" in the enterprise which furthers the purpose of its Minority Ownership Policy. 92 FCC 2d at 855.

In contexts other than those involving limited partnerships, the Commission's stated approach is to apply its minority ownership policies "where the minority ownership interest in the entity exceeded fifty percent or was controlling." Id. at 853. See also Distress Sale Policy, FCC 85-543, MM Docket No. 85-299 (released Oct. 8, 1985) at ¶ 2 ("the ownership interest held by minorities in the proposed transferee or assignee must exceed 50 percent or constitute a controlling interest"). The "ownership interests" considered by the Commission in these cases are voting interests, not equity interests, because voting interest is equated with control. See, e.g., 47 C.F.R. § 1.1621(c)(5); 47 C.F.R. § 73.3555 Note f.

In CIRI's view, this approach has led far too often to the grant of favorable treatment to an enterprise in which a minority group owns a bare majority of the voting interests but a minuscule and often contingent (e.g., subject to a "call" mechanism) amount of the equity. In such cases it is the non-minority owners, with the overwhelming majority of

the equity interest, who have de facto control, while the minority acts as a facade. CIRI has previously opposed such transactions before the Commission on the basis that they were shams.[15/] As shown above, the Commission recognized and addressed this concern with respect to limited partnerships. It should do the same with respect to other types of business structures.

In addressing the concern in the spectrum auction context, the Commission might consider requiring that, in order for an entity to be eligible for a minority preference, a minority have both de jure control (over 50% voting interests) and de facto control over that entity. However, as the Commission has recognized, "the search for control necessarily calls for an investigation beyond stock ownership in order to determine effectively where actual control resides." Stereo Broadcasters Inc., 55 FCC 2d 819, 821-822 (1975). An analysis of de facto control would involve analysis of a number of issues including: who has the power to direct the company's operations; who determines the make-up of the board of directors; whether a large minority shareholder also holds an influential executive

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[15/] See Letter to Ms. Donna R. Searcy, from Roy M. Huhndorf, President and CEO, Cook Inlet Region, Inc., in File No. BALCT-930408KF, et al., June 4, 1993. See also The Washington Post, "FCC Minority Program Spurs Deals -- and Questions," June 3, 1993, at A-1, A-9.

post — in sum, who has the right to determine the company's basic policies.[16]

In light of the complexity involved with adopting de facto control as an element of any qualification standard, CIRI urges the Commission to require that the following easily discernable elements be present in order for entities to be eligible for minority preferences:

First, minorities must have clear structural control over the applicant. To this end, in a limited partnership applicant the minority must have general partner status and there must be substantial restraints on management control by any other general partner. In a corporate applicant, minorities must at least possess 51% of the voting stock.

Second, minorities must have a minimum equity stake in the applicant and the stake must be substantial: At a minimum, minorities should hold not less than 20% of the total equity interests in the applicant.

Third, certain elements in an organizational structure which call into question the minority principal's involvement in the entity will disqualify the entity. For example, if non-minorities have the ability to "call" the minimum minority equity stake, the applicant should not be

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[16] See William S. Paley, 1 FCC Rcd 1025, 1026 (1986); Metromedia, Inc., 98 FCC 2d 300, 306 (1984), recon. denied, 56 R.R.2d 1198 (1985), appeal dismissed, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985); Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

considered eligible for minority preferences. Fourth, the Commission must require the applicant to disclose in its application -- in easily understandable terms -- how it meets each element of the minority eligibility test.

Finally, the applicant must be required to certify that it meets each element of the test and the Commission should make clear that if the applicant's statements are found to be false, the applicant (and all of its principals) will be subject to substantial penalties -- both civil and criminal -- as well as being disqualified from applying for any Commission license in the future. A warning such as the following (which is similar to that included in all FCC applications) should have a place of prominence in the "minority eligibility" certification block:

> WILLFUL FALSE STATEMENTS MADE ON THIS APPLICATION INCLUDING CERTIFICATION WITH RESPECT TO THE APPLICANT'S ELIGIBILITY AS A MINORITY-CONTROLLED ENTITY ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18 SECTION 1001), CIVIL PENALTIES (U.S. CODE TITLE 47, SECTION 503), REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(A)(1)); AND/OR DISQUALIFICATION FROM HOLDING ANY OTHER LICENSES ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION

This test and its requirements would be relatively simple to administer and would ensure that the preferences adopted to increase minority participation in telecommunications would in fact serve that purpose instead of inuring to the benefit of non-minority enterprises which

purport to be eligible for minority preferences, but, in fact, are shams.

C. The Commission Should Adopt an Array of Minority Preferences in Order to Fulfill its Congressional Mandate

1. Set-Asides

The Commission has proposed to set aside one 20 MHz spectrum block (Block C) and one 10 MHz spectrum block (Block D) exclusively for designated entity bidding. Each of the blocks would be classified for BTA service. The purpose of this set-aside would be to ensure that designated entities will participate in spectrum-based services as mandated by Congress and will not have to bid against other parties that do not need special measures under Section 309(j)(4)(D). NPRM at ¶¶ 73, 121.

a. The Proposed Set-Aside Alone will not Fulfill the Congressional Mandate

While CIRI supports the concept of a set-aside, the Commission's proposal unfortunately does not fulfill the congressional purpose to provide minorities enhanced economic opportunities to provide spectrum-based services. The set-aside of only one 20 MHz PCS block and one 10 MHz PCS block will create a spectrum ghetto for minorities because those bands simply are economically inadequate by themselves for viable PCS service.

The 10 MHz set-aside is inadequate on its face to provide viable PCS service. As Commissioner Barrett

observed in his Separate Statement on this NPRM: "I continue to be concerned about the additional complexity of aggregating several 10 MHz slivers of spectrum in order to get to a point where one can start a viable, economic PCS service . . . . [B]idders will be required to bid for at least two 10 MHz licenses before they can start any PCS service that will provide at least 70-80% coverage of BTAs in major markets." Commissioner Barrett's dissent in the PCS Order is also on point: "Until more thorough band study is provided on 10 MHz allocations above 2 GHz, I question their feasibility in terms of geographic coverage and economic service."[17] For these reasons, the 10 MHz set aside will not fulfill the congressional purpose in directing the Commission to consider minority set-asides.

The 20 MHz block may be even more problematic. Again, Commissioner Barrett has highlighted the problem: "[T]he 20 MHz BTA block in the lower band . . . could become an 'albatross' allocation" because it "may not provide full geographic coverage from the start."[18] Moreover, because the Commission has limited to 40 MHz the maximum amount of PCS spectrum any PCS licensee may acquire, the holders of 30 MHz MTA blocks would be precluded from joining with minority holders of a set-aside 20 MHz block to provide service in an

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[17] Dissenting Statement of Commissioner Andrew C. Barrett to PCS Order at 9.

[18] Id. at 10-11.

MTA. In addition, the 20 MHz block is not particularly attractive to holders of the 10 MHz blocks -- the ones who might be expected to seek aggregation with others -- because not all of the bands are contiguous and a 10 MHz licensee would be more apt to attempt to aggregate with the 30 MHz MTA licensee in a particular BTA to maximize the available spectrum up to the Commission's 40 MHz limit.

Putting aside technical compatibility problems, the holders of the 20 MHz block also will have to overcome the concerns of other potential co-venturers about significant transaction costs if they are to participate in a economically viable PCS system. For this reason, with regard to PCS, 20 MHz and 10 MHz "set-asides" by themselves will not achieve the congressional purpose to provide minorities with an enhanced opportunity to participate in spectrum-based services. However, as discussed below, permitting aggregation of those bands with others -- above and beyond what is currently authorized -- can achieve Congress' goals and serve the public interest.

b. Aggregation of Set-Asides and MTA/Cellular Bands

Because the 20 MHz and 10 MHz set-asides will not by themselves provide a viable economic opportunity for designated entities to participate in PCS, the Commission should permit the designated entities to aggregate the set-

aside bands in a way which will make their set-asides more attractive to others.

The Commission has requested comment on whether to permit combinatorial bidding on the two blocks set aside for designated groups. NPRM at ¶ 123. At a minimum, group bidding must be permitted for the set-aside blocks. But that is only a half-measure which will still not by itself effectively enhance the economic opportunities for the designated entities.

In addition to group bidding for the two set-aside blocks, the Commission should permit designated entities to aggregate their 20 MHz set-aside with the 30 MHz MTA bands despite the 40 MHz limitation otherwise imposed by the Commission. See PCS Order at ¶ 61. One 30 MHz band is contiguous with the 20 MHz band so there are sound technological reasons for permitting such an aggregation. But more specifically, permitting such a 50 MHz aggregation will make the 20 MHz set-aside instantly more viable economically.

For similar reasons, the Commission should permit a designated entity to aggregate its 20 MHz set-aside band (or at least its 10 MHz set-aside) with the bands held by an in-region cellular operator which would otherwise be limited to its 10 MHz PCS allocation. See PCS Order at ¶ 106. Again, this approach would also increase the likelihood that the set-aside spectrum will not become a ghetto but will become